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POLITICAL CRIME

We Americans are beginning to hear much of political crime in our domestic affairs. Formerly, we heard of it only in international matters, and America was the asylum for political refugees. We now have the political criminal in our midst. We do not yet recognize him in law. Other nations recognize him in international and in domestic affairs; they accord political asylum to foreign fugitives, and accord the special rights and privileges of political offenders to persons in their own midst who plot against the overthrow of their own governments. Why have European and other countries established a distinction between political and common crime? Should we draw that distinction in our own law?

Natural and Statutory Crime

The law of all civilized countries makes a distinction between natural and conventional or statutory crime. In Anglo-American law the distinction is represented by the terms *mala in se* and *mala prohibita*. The former crimes are those which are crimes even without statutory recognition; in brief, those which the common law in the opinions of judges stigmatizes as crimes. Such crimes were in our older law the felonies which were "unemendable", which could not be compounded because of their heinousness; such as manslaughter, rape, arson, burglary, robbery and larceny. The other crimes, *mala prohibita*, are those which are not, as the felonies just enumerated, inherently tainted with turpitude, but are made criminal by society in the progress of time, as social, industrial and political conditions change. These statutory or artificial crimes vary much from place to place, whereas the *mala in se*,—the "crimes in themselves,"—are almost universally accepted to be crimes in civilization of equal or approximately equal development.

Many criminologists have made this distinction. Garofalo in his "Criminology" insisted that

"Natural crimes are such acts as offend the sentiment of humanity or violate the rules of conduct exacted by the common or average probity of present day civilized people. Such crimes are murders, violent crimes, crimes which show a deficiency of probity in the author of them, and lascivious acts."

Vidal, a great authority upon French criminal law, says:¹

"Contemporary legislation, although differing, from the point of view of acts which are considered crimes, that is to say, differing,

¹Cours de droit criminel et de science penitentiare (cinquieme edition, 1916), p. 5.

from the point of view of the creation of crimes, has, nevertheless, a common character. Penalties are applied, on the one hand, to acts contrary to the general morality of the country or the time, which are condemned by the social conscience and which violate the general moral sense, such as attacks on life, health, property, morals, the exterior safety of the country, etc. The authors of these acts are *ordinary malefactors*, dreaded, despised, placed outside the social framework as *dissimilar beings*, lacking in moral sense. On the other hand, the law punishes acts or omissions which are not in themselves condemned by morals and are not contrary to the general sentiment of justice, but which the legislator, for reasons and considerations of general utility, believes ought to be prohibited, because these acts or omissions present a real danger to public order or general security. Such are violations of the laws of hunting and of fishing, of the customs laws, gambling laws, of laws concerning the practice of medicine or of pharmacy, of laws concerning foreigners in France, etc., and all violations of laws of corporation (city) ordinances. These incriminations are purely creations of the penal law. The authors of these acts cannot be confounded with the malefactors; they do not lack the *moral sense*, but only the *social sense*, lack only the understanding of those things which are socially suitable. These prohibitions are essentially variable, contingent, respond to a social need which may be but momentary and have not their source in a pre-existing sentiment of general reprobation. These crimes of purely positive creation have been called, in opposition to the natural crimes, *factitious*, *artificial crimes* of positive law. * * * If positive penal legislations of states which have the same civilization differ sensibly among themselves from the point of view of the kinds of statutory or artificial crime and the penalties for them, they tend to approach and to resemble one another in the case of natural crimes."

Political crime is not a natural crime. It is dependent upon the legislator, and differs considerably from place to place. It is still more varied than common, statutory crime. If we look about us today we see how confused the world has become. From the point of view of an American a crime may be common; from that of another it may be political. An American may consider an act committed among the Jugo-Slavs as political, though another of a different nation would consider the act a common crime. And still further, the American may consider the very same act of the Jugo-Slav when committed in this country, rank treason.

Vidal says:²

"Political crimes are those felonies and misdemeanors which violate only the political order of a state, be that order exterior,

²*Op cit.*, p. 110.

as in attacking the independence of the nation, the integrity of its territory, the relations of the state to other states; or interior, as in attacking the form of government, the organization and functioning of the political powers and the political rights of citizens. They are distinguished from ordinary violations and from those of the ordinary penal law by the nature of the right violated, by the motives by which the action is impelled and by the end the authors pursue."

This gives for the interior of the state a wide latitude. The author goes on to say that recent legislation has taken anarchist and nihilist acts out of the domain of political crime, because the motives of the anarchist and the nihilist are not political and against a particular government, but really against the very bases of social existence.³ Other writers have denied this and upheld the right of anarchists and nihilists to be treated as political offenders.⁴ Treason has been added in France and in other countries to the list of crimes punishable with death, thus making an exception to the older rule which abolished the death penalty for political crimes.⁵

In respect to the exterior, for the purposes of extradition, the author says history has vacillated and come to various conclusions. The soundest result, says the author,⁶ was pronounced by the International Institute at its session in Geneva in 1892:

³*Op. cit.*, p. 112. Garraud in "Precis de droit criminel" (onzieme edition), p. 83, fol. makes clear the distinction between pure and complex and connected political crime. The complex political crime has the taint of common crime, as assassination with political motive. Garraud believes that the objective view is the proper one. The act is to be considered common or political according as it has or has not elements of common crime. The motive may be political, but if the act is an act prohibited by the ordinary penal law, it is a common crime. For instance, the pillage of an armorer's shop with the motive of taking the weapons and using them to overthrow the government is not a pure political crime, but a connected political crime, and is stamped with ordinary robbery or larceny. But though this be true, the political motive is a valid reason for the granting of extenuating circumstances. That is, after the conviction, the sentence will be reduced because of the political motive of the act.

This objective view, however, does not always hold, says Garraud. In time of war or insurrection the war excuses the common crime, and, indeed, transforms it into a political one. The only exceptions are those which international law itself makes. I cannot criticise the views of Garraud and Vidal here. I have prepared a pamphlet on the subject of political crime viewed in its legal, sociological, psychological and criminological aspects, which deals with these views. My forthcoming book on Criminology also takes an ampler sweep than this article does in discussing political crime.

⁴Vidal, *op. cit.*, p. 112, n. 2.

⁵*Op. cit.*, p. 112.

⁶*Op. cit.*, p. 120, fol.

"Art. 1. Extradition cannot be allowed for purely political crimes.

Art. 2. It shall also not be allowed for crimes mixed or connected with political crimes, which crimes are also called relative political crimes, provided the crimes are not of the graver sort, from the point of view of morals and the ordinary penal law; such as assassination, murder, poisoning, mutilations and severe wilful and premeditated woundings, attempts to commit crimes of these sorts, and attacks against property by burning, explosion, inundation, as well as grand larceny, especially those that are committed with weapons in hand and with violence.

Art. 3. Acts committed in the course of an insurrection or a civil war, by either side in the interest of that side, cannot give rise to the right to extradition unless these acts constitute acts of odious barbarity and of vandalism which are prohibited by the laws of war, and only after the civil war shall have ended."

Colajanni in discussing in his volumes on criminology, the five classes of criminals given by Ferri, adds another class,—that of political criminals.⁷ Ferri retorts⁸ that either the political criminals are to be put into one of the five classes given by him, into the class of the occasional or that of the passion criminals, or the political prisoner is no criminal at all. The true political criminal is a pseudo-criminal, he says, and ought not to be considered in the same breath as the ordinary criminal. The latter is atavistic, harks back to a primitive and savage time; he is anti-social, anti-human, and is not to be confused with the political criminal since the latter is not anti-human, does not attack the bases of our human life, our life as social beings, but attacks only the bases of our political or governmental order which is transitory. The ordinary crimes, and particularly the *mala in se* or the natural crimes are regressive, whereas the political crimes are progressive. The natural crimes are involutive or involutory; and the political crimes are evolutive or evolutionary.⁹

All the countries of Europe—and these include all on the continent and the British Isles—that have made the distinction between ordinary and political crime, have based their theory and their practice upon the fundamental criterion which is laid down by Ferri. All the authorities on criminal law in the countries where the distinction is made give the reasons for the distinction in approximately the same terms. Vidal, for instance, writes:

⁷ "La sociologia criminale", Catania, F. Tropea (1889) 135.

⁸ "Criminal Sociology" (1916) p. 163.

⁹ Ferri, *op. cit.*, p. 335.

"For a long time political crimes were considered as graver and more dangerous than the ordinary crimes. For, whereas those ordinary crimes did not in general injure anyone except private individuals, and did not violate any except private rights, those crimes that are now known as political crimes put the state in danger and could carry along with them the overturn and the ruin of the whole country. So that they were punished under the name of *crimen majestatis* (crimes *de lèse-majesté*), crimes against the divine right of governments, with the most extreme rigor; the penalties, which were of exceptional severity, were applied also to the posterity of the guilty one, the prisoner was handed over for trial to exceptional tribunals, and, at the beginning of extradition, it was for them only that this international institution was allowed and practiced.

"This manner of looking at political criminality ceased with the Revolution of 1830. The government of Louis Philippe sharply separated the political from the ordinary crimes, established for the former a scale of special penalties milder than the ordinary penalties (law of the 28th of April, 1832, which revised the Penal Code); gave to the jury the right to judge political misdemeanors (constitution of the 14th of August, 1830, Art. 69, §1; law of the 8th of October, 1830, Art. 7); and laid down in international treaties the principle of non-extradition and the right of asylum in political matters, a principle which has today become a general rule in the international relations between civilized states.

"This absolute contrast in the treatment of political criminals is due to a change of interpretation of their character and of their role from the point of view of the evolution of humanity. Whereas formerly the political criminal was treated as a public enemy, he is today considered as a friend of the public good, as a man of progress, desirous of bettering the political institutions of his country, having laudable intentions, hastening the onward march of humanity, his only fault being that he wishes to go too fast, and that he *employs, in attempting to realize the progress which he desires, means irregular, illegal and violent*.¹⁰ If from this point of view, the political criminal is reprehensible and ought to be punished in the interest of the established order, his criminality cannot be compared with that of the ordinary malefactor, with the murderer, the thief, etc. The criminality has not at all the same immorality. It is only *relative*, dependent on time, place, circumstances, the institutions of the land, and it is often inspired by noble sentiments, by disinterested motives, by devotion to persons and

¹⁰The italics are introduced by the present writer. We ought to emphasize and study the sober commonplace statement of this authority, who speaks not for himself, but for all scientists and jurists where the distinction I wish to see drawn in this country, is drawn. It shows that Europeans are not terrified even by irregular, illegal and violent means. And yet many of our radicals do not believe in these means; and employ—or would at least, employ—if the government and mob would let them,—only constitutional methods.

principles, by love of one's country. In conclusion, the criminality is often only *passing*; the author of a political crime who is rather a vanquished, a *conquered man*, than a criminal, may become, as a result of a revolution favorable to his ideas, the *conqueror* of the morrow, who is called regularly and lawfully to direct and guide the state and the public administration of his country. The penal reaction exercised against him is not at all, then, like that exercised against malefactors, who violate the ordinary law in which case it is a work of *social defense* against an attack upon the immanent conditions of human existence, but is rather a work of the *defense of caste*, of *political parties*, against an attack upon an organization and upon a political regime historically transitory."¹¹

Both in treaties and in diplomatic practice, the distinction between political and common crime is recognized.¹² And it is recognized by our own country when a person who offends outside of the United States seeks refuge here. Political prosecutions are likely to be swayed by partisan passion says Wheaton. And the same American writer adds that men noble and venerated have assailed the political constitution of their native land. It is time that this country recognized not only political crime in other countries but political crime here.

Industrial and "Class-War" Crimes

But the older definition of political crime is going into disuse. It is not only an act which troubles the political order that comes within, or should come within, the domain of political crime; but any act which on fair interpretation (how elastic the term—no more fixed one can be offered) may trouble the political order directly or indirectly. This need not necessarily include acts which are crimes in ordinary law,—such as murder, assault, robbery,—committed with political motive—the argument for the inclusion of even these crimes I do not now make. But it ought undoubtedly to include acts which are not under the ordinary penal law crimes, but are made crimes by such laws as the Espionage Act. There is no question in the thousands of cases tried under this act that the ordinary penal law before the passage of the Act of Congress did not punish the acts therein penalized. That is to say, there was not in these cases any violence employed against person or property, which could come in as a violation of ordinary

¹¹Vidal, *op. cit.*, pp. 110-112.

¹²Wheaton, *Conflict of Laws* (3rd ed.) p. 1658, n. 3.

penal law. It is true that words are acts in law and in philosophy, and that the radicals are wrong in insisting that prosecution is unjustified under the Espionage Act on the ground that that Act punishes words not deeds, and as such is unconstitutional and contrary to the traditions of the law. The truth is that law has always laid down the proposition that words are acts. The opposition to that Act is to be made upon other grounds.

There is still another extension which should be made to social and industrial activities. Persons whose desire it is to change the social or industrial order, and who commit what would be considered a purely political crime if the act were strictly political as above defined, are to be treated as political prisoners. It is true that either directly or indirectly agitation or action to change social and industrial conditions is equivalent to agitation or action to change political conditions. But this is not generally seen. The act which seems to be directed immediately and obviously to the political organization, as the direct action upon and overthrow of the government, is the one that is recognized universally. But the direct and indirect results should be looked to; and moreover, fundamentally the mind of the author of the act is to be investigated, and his motives, end or goal explored. If these be political in the larger sense I have explained, then the act should fall within the field of political crime. Action upon the industrial field is today really political action. The stress of members of the state has changed. They see that it is not the political state, in its strict sense, that is their enemy, but the industrial state. If they control that, they control their destinies. The vital element in life today is not the "political" but the industrial; the political is the shadow, the industrial is the substance. Men want the substance. Crimes committed to change the industrial order, which has taken the place of importance of the political order, and especially those crimes which are committed without the admixture of violence, or of any element which would give them a tinge of ordinary crime, that is, those that are not mixed or connected, but purely industrial, should be dealt with as political.

The Three Elements Involved in the Determination of Crimes

There are three elements to be considered in the punishment of a person guilty of an act called by society a crime; the act, the individual and society. The balance between individual and social rights is the great problem of criminal procedure and of

penal law. Our present laws do not regard these three elements. The act done and the society in which it is done are considered. Until very recently the individual was little thought of. Individualization, or at least classification, is now beginning to be heard of in our codes and courts. But the struggle of criminologists to batter down old prejudices has been long and hard. As a rule our codes look upon the act as determining the punishment. For instance, our laws say murder, or robbery or larceny shall be punished in specific ways. *All* persons who commit these crimes are to be punished in exactly the same way; the length of the imprisonment is determined beforehand and laid down in the code. But is this scientific? Ought all to be treated alike only because they commit the same crime, the same act? One man may have committed the act through certain causes differing from those through which another committed the act; and he should be treated in a different way. To protect society it may be necessary to mete out a long term imprisonment to an habitual criminal. But this need not be the punishment given to a man who commits the crime for the first time because of exceptional circumstances which are not likely again to recur. This is individualization. And one of the most important ways of individualizing for the purpose of meeting out just treatment is by analyzing the individual, finding out all we can about his ancestry, his body, his mind, his surroundings. This method of procedure will enable us to discover the driving causes of the crime. Penalties, of themselves, applied indiscriminately will not do. To eliminate the crime, we must seek the operating causes and endeavor to eliminate them. But if we do not go so far, if we are confronted with the problem of to punish or not to punish and merely that, it is only just that we consider the crime, the society, and the *individual* who commits the crime. The reason for "punishment" is, or ought to be, to put a man dangerous to society outside of harm's way, and to re-adapt this man to the society from which he is taken because of his non-conformity. But how can we apply these principles of safety and security to society, and of re-adaptation of the criminal to social life, if we do not examine the psychology of the man and do not give weight to it.

If today we go into the mind of the political criminal at all, we come out determined to exterminate him all the more firmly because we have found him infected with ideas dangerous to the established order. But judges are beginning to see the light, and

now a judge of the Federal Court for the Southern District of New York, sitting in New York City, has said that it is now time to hearken to the voice of progress; and that voice speaks out the distinction between political and ordinary crime. Harkening to this distinction, whereas formerly the political prisoner at the bar, who had forged a passport to Ireland, would have been considered an ordinary forger and would have been harshly treated and sentenced to a long term of imprisonment, now this enlightened judge—Mr. Justice Learned Hand—proclaims that a small fine will suffice upon the plea of guilty, because the *motives* of the prisoner were *political*.¹³ This is a great advance. The mind is explored, the political end, motives and aims are found, and these change the character of the act, even such an act as forgery. How much more should the political motives, ends and aims change the character of an act when this act does not have the taint of physical violence or of common crime; I mean a “verbal act”—speech and press offences. Is this asking too much? Do we not in our ordinary affairs of life consider motive, and does not that motive change the aspect of acts? Blind punishment for acts, applied indiscriminately to all who commit those acts, is worse than a crime of society; it is, as the French say, a blunder. And blunders are sometimes conducive to more startling, revolutionary results than crimes are.

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¹³United States *v.* Liam Mellows. The defendant was sentenced in 1918, by Judge Learned Hand in the United States District Court for the Southern District of New York.